LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAY 6 1969

Supreme Court of the United States

1968

No. [redacted] 76

STATE OF LOUISIANA,

Respondent,

versus

PHILIP CARDINALE, JR.,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

NATHAN GREENBERG,
848 Second Street,
Gretna, Louisiana,
Attorney for Petitioner.

HAUSER PRINTING CO., INC., "Legal Printers", 411 GRAVIER ST., NEW ORLEANS, LA.

INDEX

	PAGE
Petition for writ of certiorari to Supreme Court of Louisiana	1
Certificate	19
Appendix A	21
Table of Authorities	i

TABLE OF AUTHORITIES

Statutes

28 U. S. Code, § 1257	2
Rule 22, U. S. Supreme Court Rules	2
L.S.A.-R.S. 15:445	6
L.S.A.-R.S. 15:446	6
L.S.A.-R.S. 15:450	6, 11
L.S.A.-R.S. 15:495	8

Cases

Escobedo v. State of Illinois, 378 U.S. 478, 83 S. Ct. 1758 (1964)	15
Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792 (1963)	15
Griffin v. California, 380 U.S. 609, 85 S. Ct. 1229 (1965)	15
Mapp v. Ohio, 367 U.S. 643, 81 S. Ct. 1684 (1961)	15
Marshall v. United States, 360 U.S. 310, 79 S. Ct. 1171, 3 L. Ed. 2d 1250 (1959)	15
Michelson v. United States, 335 U.S. 469, 69 S. Ct. 213, 93 L. Ed. 168 (1948)	12
Miranda v. State of Arizona, 384 U.S. 436, 86 S. Ct. 1602 (1966)	16
People v. Loomis, 178 N.Y. 400, 70 N.E. 919 (1904)	8

TABLE OF AUTHORITIES—(Continued)

Cases—(Continued) PAGE

Spencer v. State of Texas, 385 U.S. 554, 87 S. Ct. 648 (1967) 4, 16, 17
State v. Cardinale, ___ La. ___, 206 So. 2d 519 (1968) 1
State v. Fowler, 230 N.C. 470, 53 S.E. 2d 853 (1949) 8
State v. Myrick, 181 Kan. 1056, 317 P. 2d 485 (1945) 8
State v. Nagy, 27 N.J. Super 1, 98 A. 2d 613 (1953) 8
State v. Rives, 193 La. 186, 190 So. 374 (1939) 6, 9
State v. Skaug, 161 P. 2d 708 (Nev. 1945) 8
United States v. Jacangelo, 281 F. 2d 574 (3rd Cir., 1960) 14

Secondary Authorities

29 Am. Jur. 2d, Evidence, § 535, p. 587 10
29 Am. Jur. 2d, Evidence, § 536, p. 587 7
1 Wigmore on Evidence, § 57, p. 456 9

Supreme Court of the United States

No.

STATE OF LOUISIANA,

Respondent,

versus

PHILIP CARDINALE, JR.,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

The instant application for a writ of certiorari or review is filed herein by Philip J. Cardinale, Jr., defendant herein. Defendant was convicted of murder in the Twenty-Fifth Judicial District Court, Parish of Plaquemines, State of Louisiana, and was sentenced to death. This application for a writ of certiorari or review stems from a decree of the Supreme Court of Louisiana handed down on January 15, 1968 which affirmed defendant's conviction. An application for rehearing was filed timely, and on February 19, 1968, the application for rehearing was denied.

LOWER COURT OPINIONS

The opinion of the Supreme Court of Louisiana in the instant case is found at ____ La. ____, 206 So. 2d 510. The decree of the Twenty-Fifth Judicial District Court for the Parish of Plaquemines is unreported. Copy of the opinion of the Supreme Court of Louisiana is annexed hereto.

JURISDICTION

The jurisdiction of this Honorable Court is invoked under Title 28, U.S. Code, Section 1257, seeking to review the judgment of the Supreme Court of Louisiana handed down on January 15, 1968. An application for rehearing was timely filed, and on February 19, 1968, the said application for rehearing was denied. The denial of the application for rehearing was entered on February 19, 1968.

We respectfully submit that this Honorable Court has jurisdiction to review the decree in question herein by writ of certiorari pursuant to the provisions of 28 U.S. Code, Section 1257, and Rule 22, Supreme Court Rules.

THE ISSUES

The issues in the instant case concern the constitutionality of the procedure used herein in the trial court to convict the defendant of murder. In the instant action, homicide was allegedly committed on August 10, 1965, and thereafter the defendant turned himself in in Tucson, Arizona. During the course of his custodial interrogation in Tucson, Arizona, he referred to a prior conviction occurring in Louisiana, which prior conviction was for a crime against nature occurring on July 12, 1963, and causing the defendant to be sentenced to serve three months in the Parish Prison on March 25, 1964 (T. 126, 467). Defendant further stated during the course of his custodial interrogation that after he served his time in the Orleans Parish Prison, he went looking for his alleged prosecutrix with a gun for the stated purpose of killing her; however, he never did find her, and, therefore no further offense was committed (T. 496-510).

In the opening statement of the District Attorney for the Parish of Plaquemines, Louisiana, he referred to the alleged oral confession and particularly the alleged refer-

ence to the alleged prior offense. During the course of the interrogation by an officer from Tucson, Arizona, defendant was interrogated at length about the prior offense and the episode involving going looking for the woman with a gun. In the closing argument, the District Attorney again emphasized the prior offense and the subsequent episode relating to looking for the woman. Timely objection to this testimony and the reference thereto in the opening and closing statement was made by the defense, and bills of exception were reserved, without avail. In commenting upon the issue raised herein, the Louisiana Supreme Court stated:

> "Bill of exceptions No. 10 was reserved to the court's overruling an objection when the Tucson police officers, in the course of relating the inculpatory statement of defendant to them, referred to his admissions (made at the same time) that he had previously (several months before) been convicted of another offense and that he had searched for the prosecuting witness in that case with the intent to kill her if she were found. Bill No. 3 had already been reserved when the district attorney made reference to such admissions in his opening statement, which he was required to do if he intended to later introduce the entire confession into evidence.
>
> "We find no error in the rulings. The record shows that the admissions objected to were made in connection with and as a part of the defendant's statement outlining to the officers his participation in the instant crime.
>
> "The same contention was made in *State v. Maney*, 242 La. 223, 135 So. 2d 473. Therein we referred to LRS 15:450 (1928) Code of Criminal Procedure) which provided: 'Every confession, admission or declaration sought to be used against any one must be used in its entirety, so that the person to be affected thereby may have the benefit of any excul-

pation or explanation that the whole statement may afford.' And we held: 'The confession is not rendered inadmissible because it admits offenses other than the one for which the accused is on trial and defendant here cannot successfully invoke his contention that the evidence of the injection of heroin by him and his associate, proving another offense, if such were its effect, renders the whole statement inadmissible. The relevancy therefore, of that portion of the admission which does not bear upon the crime charged is of no consequence if the admission concerning the heroin injection was properly permitted in evidence on the basis that it was part of the same statement containing other inculpatory facts which were relevant to the crime charged and closely associated therewith in point of time. It is not denied that the statement did contain other inculpatory facts which were relevant to this prosecution.[1]

"The *Maney* holding was approved in *State v. Evans*, 249 La. 861, 192 So. 2d 103. See also *State v. Bailey*, 233 La. 40, 96 So. 2d 34."

The issue presented by the instant application for a writ of certiorari or review has been crystallized in the recent dissenting opinion of Mr. Chief Justice Warren and concurred in by Mr. Justice Fortas in the decision of *Spencer v. State of Texas*, 385 U.S. 554, 87 S. Ct. 648 (1967), the recidivist decision, wherein the issue presented by the instant case is highlighted as follows:

"* * * While this Court has never held that the use of prior convictions to show nothing more than a disposition to commit crime would violate the Due Process Clause of the Fourteenth Amendment, our decisions exercising supervisory power over criminal trials in federal courts, as well as decisions by courts of appeals and of state courts, suggest that evidence of prior crimes introduced for no purpose

> other than to show criminal disposition would violate the Due Process Clause. Evidence of prior convictions has been forbidden because it jeopardizes the presumption of innocence of the crime currently charged. A jury might punish an accused for being guilty of a previous offense, or feel that incarceration is justfied because the accused is a 'bad man,' without regard to this guilt of the crime currently charged. Of course it flouts human nature to suppose that a jury would not consider a defendant's previous trouble with the law in deciding whether he has committed the crime currently charged against him. As Mr. Justice Jackson put it in a famous phrase, '[t]he naive assumption that prejudicial effects can be overcome by instructions to the jury * * * all practicing lawyers know to be unmitigated fiction.'"

Although the *Spencer* case dealt with the question of a recidivist statute, it clearly indicates that the issue presented by the instant case is basically one of fairness. To illustrate, in *Cardinale*, the defendant pleaded guilty to a "crime against nature" approximately seventeen months prior to the charge of homicide in the instant case. On July 12, 1963, the defendant herein, Cardinale, was charged with having committed the "crime against nature", and he pleaded guilty to the charge and was sentenced to serve a term of ninety (90) days in Orleans Parish Prison on March 25, 1964. The alleged homicide in the instant case charged the occurrence of a murder on August 10, 1965, in Plaquemines Parish, Louisiana. After the alleged homicide, defendant left the State of Louisiana and subsequently voluntarily surrendered to the Tucson, Arizona, police authorities. During the course of his interrogation in Tucson, Arizona, he referred to the prior offense of which he was convicted and sentenced in March of 1964 in his purported oral confession. Defendant stated to the Tucson, Arizona

police that after he had served his sentence for the crime against nature, he went looking for the prosecutrix afterwards in the French Quarter with a gun, that he never did find the woman, but that if he had found her he would have killed her. Since the defendant stated to the Tucson authorities that he never did find the woman who was his alleged prosecutrix in the prior offense, he, therefore, never did complete any offense as to his alleged prosecutrix. Notwithstanding the fact that the defendant never did find the woman to harm her or complete any offense as to her, the District Attorney for the Parish of Plaquemines used these statements made by the defendant during the course of his oral confession and/or declaration against interest. At the trial, the District Attorney sought to use this portion of the confession under LSA-R.S. 15:445 and 15:446 for the purpose of showing a pattern and propensity towards serious and violent injury or harm in the prior offenses so as to show intent in the homicide herein. However, *State v. Rives*, 193 La. 186, 190 So. 374 (1939), holds directly against the State's argument; accordingly, the District Attorney changed his argument in the Supreme Court of Louisiana to justify the admissibility of the crucial statements contained within the oral confession on the ground that the said statements were part of an oral confession which must be admitted in its entirety, under the provisions of LSA-R.S. 15:450, which statute provides:

> "Every confession, admission or declaration sought to be used against any one must be used in its entirety, so that the person to be affected thereby may have the benefit of any exculpation or explanation that the whole statement may afford."

The Supreme Court of Louisiana based its decision in *Cardinale* upon this latter theory to sustain the admis-

sibility of the statements contained within the aforesaid oral confession and/or declaration against interest.

Under the theory advanced by the Louisiana Supreme Court in the instant case, any time an accused makes a statement while he is being interrogated, that statement is admissible in evidence against him, regardless of the relevancy thereof. The tenor of the *Cardinale* case is quoted from the language of the Supreme Court decision hereinabove, and this confirms the statements by the Supreme Court of Louisiana made by that court to counsel for defendant during the course of oral argument. However, the tenor of the *Cardinale* decision and the blanket statement to the effect that anything stated by defendant while he is in the course of a confession and/or declaration against interest is admissible, is clearly contra to the spirit and basis of fairness to the defendant in obtaining a fair trial. The rule stated in a leading secondary authority is as follows:

> "A confession is not rendered ipso facto inadmissible by the declarant's unrelated and separate offense. In proving an admissible confession, the prosecution may introduce parts of the statement which show or indicate that the accused has committed other and separate offenses, where such admissions are inseparably connected with the confession of the crime charged. However, where the relevant parts dealing with the crime charged can be readily separated from those parts confessing to other crimes, most courts have required this to be done, although where such separation is impracticable the courts have almost uniformly held that a cautionary instruction to the jury will suffice. The determination of what is reasonably separable in this respect is usually left to the sound discretion of the trial court." Evidence, 29 Am. Jur. 2d. § 536, p. 587.

Among the decisions throughout the country following the preferable rule are *People v. Loomis*, 178 N.Y. 400, 70 N.E. 919 (1904); *State v. Skaug*, 161 P. 2d 708 (Nev. 1945); *State v. Fowler*, 230 N.C. 470, 53 S.E. 2d 853 (1949); *State v. Nagy*, 27 N.J. Super 1, 98 A. 2d 613 (1953), and *State v. Myrick*, 181 Kan. 1056, 317 P.2d 485 (1957), all of which hold that where part of the confession relates to other offenses and that portion relating to the other offenses is separable, the reference to the other offense must be excluded. Your Honors will note that the so-called confession, and/or declaration against interest in the *Cardinale* case contained reference to another offense as well as to the alleged incident concerning the looking for the woman in the French Quarter with a gun, both of which were clearly separable from the alleged confession relating to the crime charged in the instant case. However, Your Honors will note that there was no attempt to separate one from the other, nor was there any attempt by the Trial Court to instruct the jury in connection with either the prior offense or the incompleted offense relating to the looking for the girl in the French Quarater with a gun. We respectfully submit that this was error on the part of the Trial Court which was perpetuated by the Supreme Court of Louisiana on different grounds.

Your Honors will note that the basis of the complaint relative to these declarations by the defendant is two-fold: (1) That the alleged oral confession contained reference to a prior offense where the defendant had not taken the stand, had not offered any evidence relative to his good character, nor had there been any basis for impeachment of the defendant's character, see LSA-R.S. 15:495; and (2) that the alleged incident concerning the looking for the woman in the French Quarter with a gun was an incomplete offense, and not a completed one; and that any

reference thereto could only have been for the purpose of bias or prejudice. *Cf. State v. Rives, supra.* We respectfully submit that the blanket admission of the entirety of the alleged oral confession without any attempt to separate these portions from the portion relating to the instant crime in question was prejudicial error and denied to defendant a fair trial.

Your Honors are well aware of the rule prohibiting the State from going into any other crime besides the crime with which the accused is charged. The basis of the rule is succinctly stated in Wigmore On Evidence, as follows:

> "The policy of the Anglo-American law is more or less due to the inborn sporting instinct of Anglo-Normandom—the instinct of giving the game fair play even at the expense of efficiency of procedure. This instinct asserts itself in other departments of our trial-law to much less advantage. But, as a pure question of policy, the doctrine is and can be supported as one better calculated than the opposite to lead to just verdicts. The deep tendency of human nature to punish, not because our victim is guilty this time, but because he is a bad man and may well be condemned now that he is caught, is a tendency which cannot fail to operate with any jury, in or out of court. There are also indirect and more subtle disadvantages.
>
> "The rule, then, firmly and universally established in policy and tradition, is that the prosecution may not initially attack the defendant's character."

See 1 Wigmore on Evidence, § 57, p. 456.

We respectfully submit that all of the facts and circumstances relating to the alleged confession and/or declaration against interest indicate that all reference to the prior offense therein should have been excluded, and in the

event of failure to exclude reference thereto, the trial court should have instructed the jury in connection therewith. However, neither were done, and the failure to do both, we respectfully submit, constitutes prejudicial and reversible error.

A leading secondary authority states:

> Parts of a confession which have no reference to the issue upon the trial are not admissible under the rule that the accused is entitled to present the entire statement or conversation connected with a confession." 29 Am. Jur. 2d., Evidence, § 535, p. 587.

Your Honors will note that the Louisiana Supreme Court attempts to justify the admissibility of the reference to both the prior conviction and the episode involving the young woman in the French Quarter on the theory that both were contained in the alleged confession and/or declaration against interest. However, analysis of the alleged confession and/or declaration against interest will readily disclose that neither incident has any relation to the crime charged. Both occurred more than a year prior to the homicide herein. Therefore, both of the above matters should have been excluded under the ruling that parts of a confession which have no reference to the issue upon the trial are not admissible. To follow the theory of the State through to a logical conclusion, the mere fact that something was said by the accused in the alleged confession and/or declaration against interest would make that testimony admissible at the trial. As has been shown, this is clearly not correct. To admit this testimony is to do violence to the basic principles of fairness which permeate due process of law.

The entire concept of the blanket admission of any-

thing stated by the defendant in the course of a confession, regardless of relevancy, materiality, etc., clearly does violence to the concept of fair trial and due process. Your Honors will note that the Louisiana Supreme Court apparently rejects the rule cited and discussed at length hereinabove that in the event the defendant makes a statement with reference to another and separate offense during the course of a confession, such admissions are admissible only if they are "inseparably connected with the confession of the crime charged." In other words, where the confession of the crime charged also contains reference to an earlier offense, the reference to the earlier offense should be disregarded unless they are so inextricably interwoven with the details of the subsequent offense that they cannot be separated. Yet this is exactly what the Louisiana Supreme Court has refused to do in the instant case, with the result being that the defendant was clearly denied a fair trial.

Your Honors can examine the testimony of the officer from the Tucson police and it will be readily apparent at once that there was no need whatever to go into the prior offense. What purpose did it serve? It served no purpose whatever except to seek to convince the jury that the defendant is a bad man. The language referring to an incomplete offense could not have served any useful purpose whatever, except to prejudice the minds of the jurors herein —which it must have done.

During the course of oral argument in the Supreme Court of Louisiana, the Chief Justice made the statement to counsel for the defendant that in the event the District Attorney had sought to delete any reference to the prior offense, counsel for the defendant would have reserved a bill of exceptions under the provisions of LSA-R.S. 15:450, on the theory that the confession was not complete. Your Honors will note that the critical aspect of this criminal

case or any other criminal case is not whether the District Attorney will commit reversible error—the critical thing in this case or any other criminal case is whether the defendant has a fair trial. This is where we respectfully submit that the Court erred.

Your Honors will also note that the District Attorney changed his approach from the time he first sought to enter the alleged oral statement into evidence in the Trial Court, to the time that he subsequently sought to justify the admission of the oral statement into evidence in the Supreme Court of Louisiana. This change of approach clearly indicates that the prosecution was grasping for a basis of making the evidence admissible, and if the defendant's rights were affected, it didn't matter to the prosecution.

In the decision of *Michelson v. United States*, 335 U.S. 469, 69 S. Ct. 213, 93 L. Ed. 168 (1948), the United States Supreme Court stated:

> "Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt. Not that the law invests the defendant with a presumption of good character, *Greer v. United States*, 245 U.S. 559, 38 S. Ct. 209, 62 L. Ed. 469, but it simply closes the whole matter of character, disposition and reputation on the prosecution's case-in-chief. The State may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge.

> The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice."

The basic criticism of the rule generally permitting the admissibility of evidence of a prior offense within the confession and/or declaration against interest is that the accused has not taken the stand nor has he opened the door to any testimony relative to his good character. In other words, according to the theory presented by the Louisiana Supreme Court in the instant case, any statement made by the defendant during the course of the confession must be admitted into evidence. However, such an analysis literally ignores the basic purpose of refusing to admit evidence of prior offenses, i.e., the jury is then confronted with the issue as to whether the defendant is a person with a "bad general record who is being denied a fair opportunity to defend against a particular charge." The Louisiana Supreme Court would appear to be interested only in the contents of the confession and/or declaration against interest, regardless of what the accused may have said concerning the prior offense or anything else. We respectfully submit that this is where the Honorable Supreme Court of Louisiana erred. The confession and/or declaration against interest in the instant case could certainly have been introduced without reference to the prior separate offense committed by the accused and without reference to the prior alleged incomplete offense. The confession and/or declaration in the instant case did not refer to these admissions as being so inseparably connected with the confession of the crime charged. In other words, the relevant portions of the confession relating to the crime charged herein could have been readily separated from those parts of the confession relating to the other or earlier crime. This is not a case

where separation would have been impracticable; such separation could have clearly occurred without affecting the issue as to the confession relating to the instant offense charged herein.

We feel compelled to call Your Honors' attention to the fact that the reference to the prior offense was made by the District Attorney for Plaquemines Parish, Louisiana, in his opening statement, in the testimony of the police officer, and in the closing statement. The District Attorney for Plaquemines Parish here sought to obtain the benefit of any inference, innuendo, or connotation which could be attributable to the defendant's statement relative to the prior offenes, regardless of the remoteness of the offense, regardless of the fact that the offense was completely unrelated to the homicide herein in any manner whatever, and regardless of the fact that the confession and/or declaration against interest herein used could have come into evidence without any reference to the prior offense.

The alleged confession and/or declaration against interest herein is very analogous to the confession sought to be used by the prosecution in the case of *United States v. Jacangelo*, 281 F.2d 574 (3rd Cir., 1960), wherein one of the defendants in the course of a confession referred to a prior conviction of his co-defendant, and the Third Circuit Court of Appeal held that any reference to the prior conviction of the co-defendant was inadmissible and constituted reversible error. The Court stated:

> "Second, the evidence of involvement in other crimes was intrinsically inadmissible as highly prejudicial information about a collateral matter not connected with the offense charged. *Brown v. United States*, 3 Cir., 1936, 83 F. 2d 383; *Helton v. United States*, 5 Cir., 1955, 221 F. 2d 338. This was a far more serious matter than the technical objection to

the statement as hearsay. To inform the jury of prior crimes of a defendant is, in the view of the Supreme Court, so improper and so prejudicial that a mistrial must be declared, even when the jurors assert that they can and will disregard that information. *Marshall v. United States*, 1959, 360 U.S. 310, 79 S. Ct. 1171, 3 L. Ed. 2d 1250.

"Third, and in our view very significantly, it would have been a simple and effective procedure merely to delete from the confession before its submission to the jury the one sentence stating that Jacangelo was 'on probation' and 'on bail'. The continuity would not have been destroyed. The author's admission of his own wrongdoing and his narration of the essential facts of the alleged conspiracy would not have been distorted or changed in any significant way. There would simply have been a proper elimination of a prejudicial collateral disclosure about Jacangelo without any attendant interference with the intended and appropriate use of the confession."

Similarly, in *Marshall v. United States*, 360 U.S. 310, 79 S. Ct., 1171, 3 L. Ed. 2d 1250 (1959), this Honorable Court granted a defendant a new trial where a newspaper account of the trial was read by several jurors, and in the article read by the jurors was a reference to a prior conviction of the defendant. This Honorable Court ordered a new trial although jurors reading the article stated that they would not be influenced thereby, and the Trial Judge stated that he felt there was no prejudice to the defendant.

The constitutional rights of an accused in a criminal action have been regularly preserved and protected by this Court. We need not go any farther than the landmark decisions involving *Mapp*, *Gideon*, *Escobedo*, *Miranda*, and *Griffin*. In all of these decisions and in the other recent decisions emanating from this Honorable Court in the field of constitutional law and criminal procedure, the glaring

and the paramount feature is the right of an accused to fair play in the course of his trial. The basic premise of fair play underlying the decisions of this court similarly exist in the instant case. The basic issue as to fair play was specifically highlighted in the dissenting opinion in *Spencer*, wherein Mr. Chief Justice Warren stated, concurred in by Mr. Justice Fortas, as follows:

> "* * * **While this Court has never held that the use of prior convictions to show nothing more than a disposition to commit crime would violate the Due Process Clause of the Fourteenth Amendment, our decisions exercising supervisory power over criminal trials in federal courts, as well as decisions by courts of appeals and of state courts, suggest that evidence of prior crimes introduced for no purpose other than to show criminal disposition would violate the Due Process Clause.** Evidence of prior convictions has been forbidden because it jeopardizes the presumption of innocence of the crime currently charged. A jury might punish an accused for being guilty of a previous offense, or feel that incarcertation is justified because the accused is a 'bad man,' without regard to his guilt of the crime currently charged. Of course it flouts human nature to suppose that a jury would not consider a defendant's previous trouble with the law in deciding whether he has committed the crime currently charged against him. As Mr. Justice Jackson put it in a famous phrase, '[t]he naive assumption that prejudicial effects can be overcome by instructions to the jury * * * all practicing lawyers know to be unmitigated fiction.'" (Emphasis supplied)

In *Miranda v. State of Arizna*, 384 U.S. 436, 86 S. Ct. 1602 (1966), this Honorable Court states:

> "A recurrent argument made in these cases is that society's need for interrogation outweights the privilege. This argument is not unfamiliar to this

Court. See, e.g., *Chambers v. State of Florida*, 309 U.S. 227, 240-241, 60 S. Ct. 472, 478-479, 84 L. Ed. 716 (1940). The whole thrust of our foregoing discussion demonstrates that the Constitution has prescribed the rights of the individual when confronted with the power of government when it provided in the Fifth Amendment that an individual cannot be compelled to be a witness against himself. That right cannot be abridged. As Mr. Justice Brandeis once observed:

> "'Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means * * * would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face.' *Olmstead v. United States*, 277 U.S. 438, 485, 48 S. Ct. 564, 575, 72 L. Ed. 944 (1928) (dissenting opinion)."

As can readily be seen, the issue presented by Cardinale herein is a natural sequel to the decision of this Honorable Court in *Spencer*. How far does *Spencer* go? Does *Spencer* furnish any reason to believe that the basic concept of fair play in due process has been modified? Should *Spencer* be limited in its application to the recidivity statute, or will it go beyond those statutes to "hold that evidence of prior crimes introduced for no other purpose other than to show criminal disposition would violate the Due Process Clause?" The issue presented by the instant case is one wherein this

Honorable Court can answer these and a number of other questions with reference to the concept of testimony relative to prior offenses, admissibility of statements relative to prior offenses within the body of a confession and/or declaration against interest, and other points requiring elaboration and elucidation.

We respectfully submit that the issues presented herein are worthy of Your Honors' attention and consideration. In the field of administration of criminal justice the likelihood of a defendant being prejudiced because of an unfair admission into evidence concerning a prior offense is too great to be ignored. Both *Michelson* and *Spencer* indicate that the procedure followed herein by the District Attorney for the Parish of Plaquemines was clearly unconstitutional. We therefore respectfully submit that the writ of certiorari requested herein should be granted for the purpose of reviewing the matter.

WHEREFORE, petitioner prays that this Honorable Court issue a writ of certiorari directed to the Honorable Judges of the Supreme Court of Louisiana, commanding them to send to this Court the necessary certified copies of the proceedings entitled "*State of Louisiana vs. Philip J. Cardinale, Jr.*", Docket No. 48,769 on the Docket of said Court and lately pending therein, to the end that their validity may be ascertained, and that after due proceedings, a writ of certiorari issue herein, to the end that the validity of said proceedings may be ascertained.

Petitioner further prays for all necessary writs and orders and decrees in the premises, and for all general and equitable relief.

NATHAN GREENBERG,
848 Second Street,
Gretna, Louisiana,
Attorney for Petitioner.

CERTIFICATE

I hereby certify that a copy of the above and foregoing application for a writ of certiorari has been mailed to the following counsel of record herein by postage prepaid:

1. Hon. Jack P. F. Gremillion
   Attorney General
   State of Louisiana
   State Capitol
   Baton Rouge, Louisiana.

2. Hon. Leander Perez, Jr.
   District Attorney
   Parish of Plaquemines
   Pointe a la Hache, Louisiana.

3. Hon. Preston Hufft
   Assistant District Attorney
   Parish of Plaquemines
   Pointe a la Hache, Louisiana.

APPENDIX

SUPREME COURT OF LOUISIANA

No. 48,769

STATE OF LOUISIANA

versus

PHILIP CARDINALE, JR.

Appeal from the Twenty-Fifth Judicial District Court for the Parish of Plaquemines, State of Louisiana; Honorable Morris G. Becnel, Judge.

HAMITER, Justice.

Philip Cardinale, Jr. was charged in an indictment with having murdered, on or about August 10, 1965, one Mary Agnes Buford. Following a trial by a jury, which resulted in a verdict of guilty, he was sentenced to death. On this appeal he relies on fourteen bills of exceptions to obtain a reversal of his conviction and sentence.

Bill No. 1 was reserved to the court's refusal to order the state, as requested in defendant's prayer for oyer, to produce "All statements obtained by the prosecution from any and all witnesses or other third persons in connection with the prosecution of the defendant herein."

There is no merit in the bill. In *State v. Haddad*, 221 La. 337, 59 So. 2d 411, we said: "It is now so firmly established in our jurisprudence that a defendant in a criminal case is not entitled to a pre-trial inspection of written confessions of co-defendants, written statements of witnesses, or police reports in the hands of the sheriff, the police department, or the district attorney that we fail to understand why defense counsel continue to present such arguments to us on appeal. *State v. Lee*, 173 La. 966, 139 So.

302; *State v. Dallao*, 187 La. 392, 175 So. 4; *State v. Williams*, 211 La. 782, 30 So. 2d 834; *State v. Mattio*, 212 La. 284, 31 So. 2d 801; *State v. Simpson, supra.* * * *" See also *State v. Cleveland and Morris Johnson*, 249 La. 950, 192 So. 2d 135.

Bill of exceptions Nos. 2 and 6 involve the same subject matter and were taken under the following circumstances: On August 12, 1965, or two days after the murder (by bludgeoning of the victim), a search warrant was obtained by law enforcement officers authorizing the search of a described Dodge automobile at a given address, this for the purpose of seizing "Sharp metal object or objects, axe, large knife, piece of metal used as a club hammer, hatchet or hatchets, human Hair, Human Blood, female clothing, shoes, ladys purse." Prior to the trial the defendant moved to suppress some of the evidence seized by means of the warrant, and he reserved bill No. 2 to the court's overruling such motion. Bill No. 6 was taken during the trial when the court denied defendant's objection to the introduction of human hair and blood found in the trunk of the searched vehicle. (Two other search warrants obtained at the same time authorized search for the identical articles in a building and a shed located at the mentioned address. However, evidence taken in connection with the motion to suppress revealed that the searches made under these warrants produced nothing for the state to use in the prosecution. Consequently, the court's overruling the motion to suppress as to them was not prejudicial and is immaterial here.)

The accused concedes that the warrant is in proper form and was issued on probable cause. (We have examined the application for the warrant, but in view of defendant's concession it is unnecessary to discuss in detail the fact of

the issuance thereof.) The sole basis for urging the alleged invalidity of the warrant, and the impropriety of introducing the evidence obtained through its use, is that such was directed against the obtaining of items purely "evidentiary" in nature and, therefore, not subject to seizures and subsequent use in the prosecution of the cause.

In connection with these bills the defendant contends that the provisions of LRS 15:42 and 43 (1928 Code of Criminal Procedure) do not include "evidentiary" things as among those which might be the subject of a search warrant; and that, because these sections limit the objects for which a search can be made, the warrant herein authorizing a search for the items sought was improper and illegal. However, LRS 15:41 (1928 Code of Criminal Procedure), which must be read in connection with the two succeeding sections, grants to the courts unlimited authority to issue search warrants. And the authority therein granted is circumscribed, we think, only by the provisions of Article I, Section 7 of the Louisiana Constitution which provides that no search or seizure shall be made except upon warrant issued upon "probable cause" (such probable cause usually being a showing of a nexus between the object sought and the commission of a known or suspected crime).

The mentioned Sections 42 and 43 do not, in our opinion, constitute a limitation of that authority; rather, they provide additional instances where a warrant might issue. Thus, Section 42 permits the obtaining of possession of stolen property and Section 43 authorizes seizure of property which, by nature, is contraband and to which, therefore, the state has the right of possession without there necessarily having been a crime committed.

The defendant additionally contends that the search and seizure, as well as the subsequent use in the prosecu-

tion of the defendant, of the purely evidentiary items violated his rights provided for in Article IV and V of the Federal Constitution. He relies on *Gouled v. United States*, 225 U.S. 298, 65 L. Ed. 647, as approved in *United States v. Lefkowitz*, 285 U.S. 452, 76 L. Ed. 877.

Conceding, arguendo, that some of the broad language used in the *Gouled* opinion might furnish some support to defendant's contention, the effect of that opinion has been specifically limited in the more recent case of *Warden v. Hayden*, ___ U.S. ___, 18 L. Ed. 2d. 782. In the latter the court approved the seizure of wearing apparel of the accused and the introduction thereof into evidence. In so doing it observed: "We come, then, to the question whether, even though the search was lawful, the Court of Appeals was correct in holding that the seizure and introduction of the items of clothing violated the Fourth Amendment because they are 'mere evidence.' The distinction made by some of our cases between seizure of items of evidential value only and seizure of instrumentalities, fruits, or contraband has been criticized by courts and commentators. The Court of Appeals, however, felt 'obligated to adhere to it.' 363 F. 2d. at 655. We today reject the distinction as based on premises no longer accepted as rules governing the application of the Fourth Amendment."

The court then pointed out that the only proper application of *Gouled* would be in cases where the items seized were private papers, writings, or documents of the suspect to the extent that their involuntary seizure and use as evidence against him "would be, in effect, as ruled in the *Boyd* case, to compel the defendant to become a witness against himself." And the court concluded: "The items of clothing involved in this case are not 'testimonial' or 'communicative' in nature, and their introduction therefore did not

compel respondent to become a witness against himself in violation of the Fifth Amendment. *Schmerber v. California*, 384 U.S. 757, 16 L. Ed. 2d. 908, 86 S. Ct. 1826. This case thus does not require that we consider whether there are items of evidential value whose very nature precludes them from being the object of a reasonable search and seizure."

Even less "testimonial", or "communicative" in nature, were the objects seized and introduced into evidence in the instant case, they consisting of the hair and blood of the victim, and not the property of defendant at all.

We find no error, therefore, in the court's overruling the motion to suppress (bill No. 2) and allowing the evidence obtained through use of the warrant to go to the jury (bill No. 6).

Bill of exceptions No. 4 is leveled at the failure of the Clerk of Court to read the indictment, as well as the plea of not guilty of the defendant, to the jury prior to the commencement of the taking of testimony, as is provided in LRS 15:333 (1928 Code of Criminal Procedure). *State v. Ducre*, 173 La. 438, 137 So. 745 is cited as authority to support the defendant's contention that such failure constituted reversible error.

In view of the holding of this court in *State v. Leslie*, 244 La. 921, 155 So. 2d 19 we are of the opinion that this bill is without substance. The record reflects that initially herein the clerk did, inadvertently, omit the reading of the indictment and the plea of not guilty of the defendant to the jury. However, while the state's first witness was testifying the court itself took cognizance of such omission. And at that time it interrupted the proceedings and ordered that the indictment and the plea of the accused be then read. This was done. Incidentally, counsel for the

accused offered no objection to the omission as an initial step in the trial.

In *State v. Leslie, supra,* under similar circumstances, we said: "The reading of the plea to the jury, like the opening statement of the district attorney which follows it in statutory sequence, is mandatory. This means that **when timely objection is made to its omission,** the failure of the trial judge to require that the plea be read is error. See *State v. Gayton,* 221 La. 1115, 61 So. 2d 890 and *State v. Ducre,* 173 La. 438, 137 So. 745.

"In the instant case, however, the defense made no objection at the time of the omission. The trial proceeded. The district attorney made his opening statement. Defense counsel waived an opening statement. The district attorney commenced the introduction of evidence. The testimony of two witnesses had been adduced by the state, when objection was raised for the first time. Thereupon, the court required the plea to be read to the jury and overruled the objection. Under these circumstances, we are of the opinion that the right of the defendant to have the plea read in proper sequence was waived.

"* * * * * * * * * * *

"The defendant relies principally upon *State v. Ducre, supra,* wherein the Court held that the refusal of the trial judge to order the district attorney to make an opening statement as required by Article 333 of the Code of Criminal Procedure (now LSA-R.S. 15:333) was reversible error. In that case, unlike the present one, the defendant made prompt request of the court for the ruling prior to the introduction of evidence. The case was thus distinguished in *State v. Shearer,* to which reference has been made." (Emphasis ours)

Bill of exceptions No. 5 was reserved to the court's permitting Jim Hoffman, who had been qualified by the state as an expert in photography (preparatory to introducing certain photographs), to testify with regard to a sketch he had made of the scene of the crime. The defense contends that the qualification of the witness in the field of photography did not permit his giving testimony with a plat prepared by him.

It was established that the digram had been drawn by the witness according to the things he had actually seen while he was at the locale. As the trial court observed, when it overruled the objection, "It is within the realm of his own knowledge" to prepare and testify from the sketch. Consequently, no expert qualifications were required for such testimony.

We perceive no error in the court's ruling.

Bills of exceptions Nos. 7 and 9 were taken to the introduction of an inculpatory statement (or confession) of the accused made to law enforcement officers of Tucson, Arizona. There is no contention whatsoever that the statement was not completely voluntary, and the evidence itself shows quite the contrary. **The accused voluntarily sought out and surrendered himself to the Tucson police officers,** who at such time had no knowledge of the instant crime or that the defendant was wanted as a fugitive; he told them he was probably wanted in Louisiana in connection with the crime; and, after being advised of his right to counsel, **he freely recited the facts to which the officers from Tucson testified.**

In view of these circumstances, which are not disputed, the guidelines set down in *Escobedo v. Illinois*, 378 U.S. 490, 12 L. Ed. 2d. 977, are not applicable. See also

State v. Cleveland and Morris Johnson, supra, and *State v. Aherns,* 250 La. 391, 196 So. 2d 250.

The sole basis for the objection to the statement is that the accused was not offered the services of an attorney as required by the decision in *Miranda v. Arizona,* 384 U.S. 436, 16 L. Ed. 2d. 694. But inasmuch as the trial of this defendant commenced on May 2, 1966, prior to the effective date of the *Miranda* case (which was June 13, 1966), the decision therein is not applicable. See *Johnson v. State of New Jersey,* 384 U.S. 719, 16 L. Ed. 2d. 882; *State v. Evans,* 249 La. 861, 192 So. 2d 103; *State v. Gregoire,* 249 La. 890, 192 So. 2d 114; *State v. Cleveland and Morris Johnson, supra,* and *State v. Aherns, supra.*

Moreover, the circumstances recited above of the giving of the statement in the instant case, we think, take it out of the rule laid down in *Miranda.* Therein the United States Supreme Court prefaced its holding by pointing out that its guidelines were to apply to statements "stemming from custodial interrogation" of the defendant, and that "By custodial interrogation, we mean **questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action** * * *." And it concluded its discussion with the following observation: "In dealing with statements obtained through interrogation, we do not purport to find all confessions inadmissible. Confessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influence is, of course, admissible in evidence. The fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but whether he can be interrogated. **There is no requirement that police stop a person who enters a police**

station and states that he wishes to confess to a crime, or a person who calls the police to offer a confession or any other statement he desires to make. Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today." (Emphasis ours)

The objection to the introduction of the inculpatory statement was, therefore, groundless.

Bill of exceptions No. 10 was reserved to the court's overruling an objection when the Tucson police officers, in the course of relating the inculpatory statement of defendant to them, referred to his admissions (made at the same time) that he had previously (several months before) been convicted of another offense and that he had searched for the prosecuting witness in that case with the intent to kill her if she were found. Bill No. 3 had already been reserved when the district attorney made reference to such admissions in his opening statement, which he was required to do if he intended to later introduce the entire confession into evidence.

We find no error in the rulings. The record shows that the admissions objected to were made in connection with and as a part of the defendant's statement outlining to the officers his participation in the instant crime.

The same contention was made in *State v. Maney*, 242 La. 223, 135 So. 2d 473. Therein we referred to LRS 15:450 (1928 Code of Criminal Procedure) which provided: "Every confession, admission or declaration sought to be used against any one must be used in its entirety, so that the person to be affected thereby may have the benefit of any exculpation or explanation that the whole statement may afford." And we held: "The confession is not rendered

inadmissible because it admits offenses other than the one for which the accused is on trial and defendant here cannot successfully invoke his contention that the evidence of the injection of heroin by him and his associate, proving another offense, if such were its effect, renders the whole statement inadmissible. The relevancy therefore, of that portion of the admission which does not bear upon the crime charged is of no consequence if the admission concerning the heroin injection was properly permitted in evidence on the basis that it was part of the same statement containing other inculpatory facts which were relevant to the crime charged and closely associated therewith in point of time. It is not denied that the statement did contain other inculpatory facts which were relevant to this prosecution."

The *Maney* holding was approved in *State v. Evans*, 249 La. 861, 192 So. 2d 103. See also *State v. Bailey*, 233 La. 40, 96 So. 2d 34.

On cross examination of one of the state's witnesses (Deputy Ernest Amos) defense counsel attempted to elicit from him whether the defendant had ever denied committing the crime. The state's objection to the question was sustained and bill of exceptions No. 8 was reserved. We find no error in the ruling.

The cases cited by defendant do not support his contention that the action constituted reversible error. In fact, their holdings are to the contrary. Thus, in *State v. Johnson*, 35 La. Ann. 968, the court held that certain self-serving statements of an accused were properly excluded and observed: "* * * The rule is undoubted that, when confessions or statements of an accused are offered, they must go in all together; but that only applies to declarations made at one time or having some connection with each other.

"Here we find no connection whatever between the admitted confessions and the rejected declarations, the former having been made six weeks after the latter. Manifestly, the prior self-serving declarations could not weaken the effect of the latter self-incriminating ones. The former are rejected as unworthy of reliance, because springing, presumably, from self-interest; the latter are received for precisely the converse reason." To the same effect are *State v. Gunter, 30 La. Ann. 536* and *State v. Rutledge*, 37 La. Ann. 378.

It is not contended here that the self-serving declarations about which the witness was questioned were made in connection with any confession or inculpatory statement, and, particularly, there appears no confession made in the presence of this witness. Moreover, the witness stated unequivocally that he had no recollection of any conversations he might have had with the defendant.

Bill of exceptions No. 11 was taken to the court's accepting the witness Milton Cox, over defendant's objection, as an expert "criminalist"—one versed in the skills and techniques involved in laboratory crime detection—to lay the foundation for his testimony connecting blood, hairs, etc. found in the defendant's automobile with that of the deceased, and also showing that shoes found in the possession of defendant contained soil the same or similar to that where deceased's body was found.

The record shows that the trial judge was satisfied as to the witness' qualification. In *State v. Stahl*, 236 La. 362, 107 So. 2d 670 we observed: "* * * The rule is well settled that whether a witness is entitled to be heard in the capacity of expert is within the trial judge's province to decide, and his ruling will not be disturbed where no error appears. * * *"

We have examined the evidence relating to Cox's qualification in the stated field and find that his formal education as well as his practical experience in this area fully justified the court's acceptance of him as an expert. There is, therefore, no merit in the bill.

Bill of exceptions No. 12 was reserved to the testimony of Cox that certain shoes exhibited to him appeared to have been recently washed, it being argued that he had not been qualified as an expert to express an opinion on such matters. We conclude that the court was correct in its observation that the objection was not well grounded for the reason that no special qualifications were required to answer the question and that "anyone of a number of individuals in this court room could perceive and observe that a piece of leather has been soaked and wet and is moist." The bill is without substance.

While the witness was testifying regarding a hatchet which, as had been established by other witnesses, had been taken from the defendant's abandoned truck, he stated that he had found no evidence of blood on the hatchet. Originally he had said that he did not have the hatchet with him. Later he stated that he was in error and that he did have it. When the prosecuting attorney asked to see it defense counsel objected, urging that it was irrelevant since there were no blood stains found on it and that he had not had an opportunity to cross examine the witness about the hatchet because he had said he did not have it. On completion of the state's questioning of the witness, defense counsel was permitted to cross examine him at length about his negative findings with regard to the hatchet. When the state offered to introduce the hatchet into evidence the defendant objected. The court observed (in effect), in ruling on the objection, that out of an abundance of precaution he would

sustain the objection. Whereupon defense counsel moved for a mistrial because the hatchet "has been exhibited to the jury and it is prejudicial and *de*famatory" (inflamatory). Bill of exceptions No. 13 was reserved to the court's overruling the motion for a mistrial.

We find no merit in the bill. First of all we note that, without taking a bill in connection with his original objection or reserving his rights thereunder, defense counsel himself questioned the witness concerning the hatchet. Moreover, it had been shown that the victim had suffered severe fractures and lacerations of the head and upper portion of the body, caused by a fairly sharp and rather heavy object such as a cleaver or hatchet. It had also been shown that the hatchet referred to by the witness had been found in defendant's truck in his presence and to which he had voluntarily directed police officers. Under these circumstances it appears to us that his ownership and possession of such an instrument was relevant, even though no blood stains were found on it. The result of Cox's testimony would not render the introduction less revelant, but would only lessen the probative effect of its having been in defendant's possession, redounding to his benefit rather than to his prejudice. Besides, inasmuch as the court did not permit the hatchet to go to the jury, we do not perceive how merely viewing an ordinary hatchet during the examination of the witness could have caused such alleged inflamatory and prejudicial results in he minds of the jury.

Bill of exceptions No. 14 is directed to the fact that the jury deliberated only one and one-half hours before returning their verdict of guilty. Defendant urges that the short time taken "clearly indicates a lack of serious deliberation upon a matter so serious as the life or death of the accused, and for this factor alone [this bill] should be the basis of a mistrial."

We know of no law requiring any specific time for jury deliberations. Nor can we presume prejudice merely from their reaching an early verdict. Defense counsel says in his brief that the state presented its evidence for two and one-half or three days. The trial judge has not favored us with a per curiam to this bill, but the entire record has been sent to this court and we note that the defense offered no rebuttal evidence whatsoever. In such circumstances we cannot, without a more positive showing, say that the jury erred in its deliberations. The bill is without merit.

Before closing this opinion we feel compelled to note the lack of per curiams by the trial judge. In no instance has he prepared one. Rather, he filed what he terms a "general per curiam" wherein he refers to the pages of the entire transcript (three volumes) that relate to the proceedings during which the respective bills were reserved. While such procedure may, as suggested by the judge, provide a "simple and expedient method" of presenting his views, we do not deem it a satisfactory method of presentation for our appellate review.

For the reasons assigned the conviction and sentence are affirmed.